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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to	)	RM No. 9097
Amend 47 C.F.R. Section 76.1003 - -	)	
Procedures for Adjudicating	)	
Program Access Complaints	)	

To: Cable Services Bureau

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch

Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, DC 20006
(202) 783-4141

Its Attorneys

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA") supports the petition for rulemaking filed by Ameritech New Media, Inc. (the "Ameritech Petition") in this proceeding. WCA believes that the Ameritech Petition stands for one overriding proposition: program access remains the most critical issue facing alternative multichannel video programming distributors ("MVPDs") seeking to compete with incumbent cable operators. In view of recent developments in the cable industry, the Ameritech Petition serves as a timely reminder that the Commission must periodically assess its program access rules to ensure that they keep apace with the demands of a dynamic marketplace.

By the end of this year, consolidation within the cable industry will accelerate to unprecedented levels, particularly among the larger, vertically integrated MSOs. As a result, cable programming services will be even more beholden to the large MSOs (and, correspondingly, under greater pressure not to sell to cable's competitors) as they tighten their control over distribution on a national and regional scale. Furthermore, the expansion of joint ventures between non-vertically integrated programmers and the largest MSOs will have a similar chilling effect on the willingness of cable programmers to sell to wireless cable operators and other alternative multichannel video programming distributors ("MVPDs"). At the same time, the wireless cable industry's ongoing conversion to digital transmission will threaten increased competitive pressure on incumbent cable operators, providing unprecedented incentive for the MSOs to pressure programmers to delay selling to wireless cable operators for as long as possible. In this scenario, wireless cable operators will have little choice but to enforce their rights through the Commission's program access complaint process sooner rather than later.

Accordingly, for the reasons set forth herein, WCA submits that the Commission should modify its program access rules to provide complainants with a limited right of discovery. Simply stated, the Commission's existing discovery procedures strain the Commission's limited resources and delay the production of critical material which alternative MVPDs need in order to present their best case. By standardizing the discovery process, the Commission will alleviate its processing burdens and minimize the administrative delays that prevent alternative MVPDs from having access to programming that is critical to their survival.

In addition, WCA supports Ameritech's request that the Commission modify its rules to specifically provide for a damages remedy in program access cases. Under the current regulatory framework, the absence of a damages remedy essentially rewards defending parties for their illegal conduct, since they are able to withhold programming for indefinite lengths of time with the knowledge that they can either settle their cases at the last possible moment or, at worst, receive a Commission sanction that only requires them to modify their future behavior. A damages remedy would create substantial disincentives for this type of conduct, and would promote near-term resolution of program access complaints.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in support of the above-captioned petition for rulemaking filed by Ameritech New Media, Inc. (the "Ameritech Petition").

I. INTRODUCTION.

The Ameritech Petition stands for one overriding proposition: program access remains the most critical issue facing alternative multichannel video programming distributors ("MVPDs") seeking to compete with incumbent cable operators. As demonstrated in volumes of evidence submitted to Congress and to the Commission during passage and implementation of the program access provisions of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), alternative MVPDs cannot survive without fair and equitable access to the cable programming services which have now become staples of television viewing among American consumers. WCA believes that by and large the Commission has recognized this basic fact in the design and enforcement of its program access rules, and WCA has every expectation that the Commission will

continue to do so in accordance with Congressional intent.

WCA submits, however, that the Ameritech Petition serves as a timely reminder that the Commission must periodically reassess its program access rules to ensure that they keep apace with the demands of a dynamic marketplace. Nearly five years have elapsed since passage of the 1992 Cable Act, which itself has been revised by the Telecommunications Act of 1996. During that period, the convergence of changing regulatory and marketplaces forces has prompted the Commission to reevaluate whether certain of its other rules for MVPDs should be revised to promote the competition desired by Congress.[1/] Given the importance of program access to alternative MVPDs and their subscribers, WCA believes that these very same regulatory and marketplace forces by themselves militate strongly in favor of a rulemaking to address the issues raised in the Ameritech Petition.

WCA also believes there are a number of specific reasons for positive action on the Ameritech Petition at this time. First, notwithstanding Congress' and the Commission's persistent attempts to improve competitive opportunities for alternative MVPDs, the undisputed fact is that the cable industry is and for the foreseeable future will continue to be the dominant provider of multichannel video service in virtually all markets throughout the United States.[2/] As the

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[1/] *See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests,* MM Docket No. 94-150, FCC 96-436 (rel. Nov. 7, 1996); *Telecommunications Services Inside Wiring - Customer Premises Equipment*, CS Docket No. 95-184, FCC 95-504 (rel. January 26, 1996).

[2/] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133 , FCC 96-496, at ¶ ¶ 13-14 (rel. Jan. 2, 1997) [noting that at the end of 1995 cable service was available to 96.7% of all television households, and that cable subscribership had risen to 67% of all homes passed] [the "*Third Annual Report*"].

Commission recently observed:

> In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.[3/]

Furthermore, it is equally clear that the large cable MSOs will not hesitate to exercise the leverage they possess as a result of their stranglehold on local distribution:

> Operators warn that if existing programmers don't play ball on exclusivity, a new and similar network probably will. "There's more than one news service and more than one sports service now and more competition is inevitable," says an executive at one of the U.S.'s five largest MSOs. "We have choices and if one service doesn't want to work with us, we have other places we can go."[4/]

The recent wave of consolidation within the cable industry strongly suggests that this problem may become irreparably worse if the Commission does not seize the opportunity to reevaluate its program access rules as suggested in the Ameritech Petition. As the Commission observed in its *Report and Order* applying its program access rules to open video systems, concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct.[5/] By the end of 1995, the four largest MSOs served

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[3/] *Id.* at ¶ 128.

[4/] "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996).

[5/] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996).

61.4% of all cable subscribers nationwide - Tele-Communications, Inc. ("TCI") (27.9%), Time Warner (18.9%), Continental/U S WEST (7.7%) and Comcast (6.8%).[6/] Moreover, the cable industry has become highly concentrated at the regional level as well: the number of cable system "clusters" serving at least 100,000 subscribers increased from 97 at the end of 1994 to 137 by year-end 1995, accounting for 50% of all cable subscribers nationwide.[7/] Among the four largest MSOs, Time Warner and TCI each controlled 32 such clusters, and Comcast controlled six.[8/]

By the end of *this* year, however, consolidation within the cable industry will accelerate to unprecedented levels, in large part due to TCI's recently announced plan to enter into joint ventures with other large MSOs for the purpose of forming regional cable clusters in large markets across the United States.[9/] Most significantly, TCI has agreed to sell 10 cable systems serving 820,000 subscribers in the New York ADI to Cablevision Systems Corp. ("Cablevision") in exchange for a one-third interest in that company.[10/] Because Cablevision already owns systems serving 1.7 million subscribers in the New York market, its acquisition of the TCI systems will create a cluster of 2.5 million subscribers, the largest of its kind in the United States.[11/] The following excerpt from a trade

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[6/] *Third Annual Report* at ¶ 130.

[7/] *Id.* at ¶ 137.

[8/] *Id.*

[9/] Robichaux, "TCI Closing Deals with Time Warner, Others to Shed Subscribers, Slash Debt," *Wall Street Journal,* at B14 (June 24, 1987); Higgins, "TCI Cablevision Numbers Puzzle Wall Street," *Broadcasting*, at 54 (June 16, 1997).

[10/] Umstead, "More Moves for TCI/Cablevision?", *Multichannel News*, at 1 (June 16, 1997).

[11/] *Id.* In addition, TCI has entered into an agreement with Adelphia Communications Corp. to form a 466,000 subscriber cluster in Pennsylvania, New York and Ohio. Neel, "TCI Shuffles the Deck," *Cable World*, at 8 (June 16, 1997). TCI is also expected to announce

press report about the TCI/Cablevision deal speaks volumes about its potential effect on program access:

> [Cablevision chairman Charles] Dolan takes pains to describe the TCI deal as "stand-alone", with no side agreements for either MSO to push carriage of their programming services. "*But that doesn't mean that won't come later.*"[12/]

Further, shortly after the announcement of the TCI/Cablevision transaction, Fox Sports Net, which is a 50/50 venture between TCI's Liberty Media Corp. and News Corp.'s Fox Sports, announced an agreement to purchase 40 percent of Cablevision's SportsChannel regional networks.[13/] The eight owned-and-operated Fox/Liberty regional sports networks and the seven SportsChannel regional services will be merged to create a new national sports network that will compete directly with ESPN.[14/] In effect, this transaction means that Fox has entered into a joint sports programming venture with the largest cable operator in the United States (TCI), which in turn will hold a one-third interest in the sixth largest MSO in the United States (Cablevision), which in turn will soon own and

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similar transactions with Adelphia in Miami; with Comcast in Pennsylvania and New Jersey; with TCA Cable in Texas; and with InterMedia Partners in Kentucky. *Id.*

[12/] Paskowski, "Dolan's Mother of All Clusters," *Multichannel News*, at 56 (June 16, 1997) [emphasis added]. In addition to its regional SportsChannel networks and the MSG Network, Cablevision, through Rainbow Media Holdings Inc., owns the following cable programming services: Bravo, Independent Film Channel, Romance Classics, American Movie Classics, MuchMusic and American Sports Classics. According to the Commission's *Third Annual Report*, TCI owns the following cable programming services in the amounts indicated: Encore (90%), Home Shopping Network I & II (80%), fX and FXM (50%), Starz! (49.9%); The Learning Channel (49%); QVC and QVC2 (42.6%); Request Television/Request 2/Request 3-5 (40%); and Viewers Choice/Viewers Choice: Hot Choice/Viewers Choice: Continuous Hits (10%). *See Third Annual Report*, Appendix G, Table 1.

[13/] Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1 (June 23, 1997).

[14/] *Id.*

operate the largest single cable cluster in the largest television market in the United States.

And there is more. It has also been announced that mid-power DBS operator PrimeStar Partners will acquire the high-power DBS orbital slot and two satellites owned by American Sky Broadcasting, the DBS venture backed by News Corp. and MCI Communications.[15/] In return, News Corp. will receive $1.1 billion worth of non-voting securities in PrimeStar, which is jointly owned in large part by TCI, Time Warner, Comcast and Continental/US WEST.[16/] In connection with that transaction, Fox has already entered into carriage agreements with PrimeStar for its Fox News Channel and FX programming service; both will be carried after PrimeStar introduces high-power DBS service on News Corp.'s satellites.[17/] Finally, Microsoft, which is 50% owner of the MSNBC programming service, is making a $1 billion investment in Comcast, which serves 4.3 million subscribers nationwide and holds ownership interests in Liberty and a variety of programming services.[18/]

These transactions will in at least two respects put alternative MVPDs in a precarious

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[15/] Breznick and Stump, "A DBS Powerhouse: News Corp., PrimeStar Finally Make it Official," *Cable World*, at 1 (June 16, 1997).

[16/] *Id.* Time Warner's wholly-owned cable programming services include Cartoon Network, Cinemax, CNN, CNN International, CNNfn (The Financial Network), HBO/HBO2/HBO3, CNN Headline News, TBS, TNT, and Turner Classic Movies. In addition, Time Warner holds a 50% interest in Comedy Central, a 49% interest in E! Entertainment, a 33.3% interest in Court TV, and a 15% interest in Black Entertainment Television (BET). *Third Annual Report*, Appendix G, Table 1.

[17/] Gibbons, "PrimeStar Must Roll Onto Cable Turf," *Multichannel News*, at 3, 54 (June 16, 1997).

[18/] Ellis, "What Microsoft Wants with Comcast Corp.," *Multichannel News*, at 1 (June 16, 1997). Comcast-owned programming services include QVC, The Golf Channel, Viewer's Choice, Outdoor Life, Speedvision and the Sunshine Network.

position when attempting to acquire the popular cable programming services essential to their survival. First, it is beyond dispute that cable programming services cannot succeed unless they are able to reach a critical mass of cable subscribers, and thus will be even more beholden to the large MSOs (and, correspondingly, under greater pressure not to sell to cable's competitors) as TCI and others tighten their control over distribution on a national and regional scale. As noted with respect to the Time Warner/Turner merger:

> The launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers . . . TCI and Time Warner are the two largest MVPDs in the U. S. with market shares of 26.7% and 17%, respectively. Carriage on one or both systems is critical for new programming to achieve competitive viability.[19/]

Second, the expansion of joint ventures between programmers not traditionally considered to be vertically integrated (Fox and Microsoft) and highly vertically integrated cable operators such as TCI, Time Warner, Cablevision and Comcast will have a similar chilling effect on the willingness of cable programmers to sell to alternative MVPDs. For instance, it has recently come to WCA's attention that certain wireless cable operators have been having trouble securing affiliation contracts with the various Fox services and MSNBC.[20/] WCA expects that this problem will be exacerbated by the fact that Fox and Microsoft have become even more closely aligned with cable operators

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[19/] Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, *In the Matter of Time Warner Inc.*, FTC File No. 961-0004, at 7-8 (Sept. 12, 1996).

[20/] *See*, Kreig, "Wireless Cable: Connecting to the Future," *Multichannel News*, at 53 (June 23, 1997).

serving the majority of subscribers throughout the United States. Moreover, there already is some evidence that the new Fox/TCI/Cablevision national cable sports programming service will give TCI's cable systems additional leverage over ESPN and other competing cable sports programming services, thereby providing an additional means for encouraging programmers like ESPN to engage in discriminatory conduct towards alternative MVPDs as a means of currying favor with TCI.[21/]

WCA firmly believes that the above-described developments within the cable industry combined with ongoing changes within the wireless cable industry inevitably will force the Commission to devote more of its limited resources to program access matters over the next few years. The recent slow growth of the wireless cable industry (and, as a result, the relatively small number of program access complaints filed by wireless cable operators) can be traced to one factor - - the coming digitization of many wireless cable systems. Until recently, many wireless cable operators have been reluctant to expend significant funds in launching new analog systems or adding additional analog subscribers to existing systems when digitization is just around the corner.

The wireless cable industry's conversion to digital, however, will soon come to fruition as a number of larger wireless cable operators begin to launch digital wireless cable systems in direct competition with the large cable MSOs.[22/] This new competition, combined with the fact the

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[21/] Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1, 54 (June 23, 1997) ["[T]he deal would give TCI leverage in future contract dealings with ESPN. Although the two companies reached a 10-year carriage agreement last April, the rates would be adjusted downward if ESPN loses any major professional-sports rights, such as those for the National Football League."].

[22/] *See, e.g.*, Gibbons, "PCTV's Story: Waiting for Digital," *Multichannel News*, at 54 (Dec. 9, 1996); Barthold, "A Foggy Road Ahead," *Cable World*, at 21 (Jan. 27, 1997); Barthold, "Going Digital," *Cable World*, at 22 (Jan. 27, 1997); Breznick, "BellSouth Eyes Atlanta, New Orleans, Miami for '98 MMDS Launches," *Cable World*, at 12 (Dec. 2, 1996); Estrella, "Is L.A. the

Commission's prohibition on exclusive programming contracts may sunset in little more than five years,[23] will give MSO-affiliated cable programmers unprecedented incentive to delay selling programming to wireless cable operators for as long as possible. In this scenario, wireless cable operators will have little choice but to enforce their rights through the Commission's program access complaint process sooner rather than later.

WCA acknowledges that in the past the Commission has been hesitant about making any substantive changes to its program access rules in the absence of particularized evidence that cable's competitors are suffering any additional harm by virtue of the current regulatory framework.[24] However, in view of the above-described developments, WCA believes it would be prudent for the Commission to at least consider limited changes to its program access rules that will streamline the complaint process and thereby minimize the delays which invariably prejudice alternative MVPDs and create excessive processing burdens on the Commission's staff. Accordingly, WCA supports Ameritech's proposal to modify the Commission's rules to (1) allow complaining parties to obtain discovery as a matter of right and (2) expressly provide for the award of damages for program access

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MMDS Industry's Last Stand?", *Multichannel News*, at 39 (June 23, 1997). Equally significant is the fact that the industry recently filed a Petition for Rulemaking requesting that the Commission adopt rules that will allow wireless cable operators to use MDS and ITFS channels to provide two-way services. Petition for Rulemaking re: In the Matter of Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions, File No. RM-9060 (filed Mar.14, 1997). If granted, the Petition will enable wireless cable operators to supplement their digital multichannel video service with a broad variety of two-way and interactive services, including Internet access and high-speed data transmission.

[23] 47 U.S.C. § 548(c)(5).

[24] *See, Third Annual Report* at ¶¶ 153-158.

violations.[25/]

II. DISCUSSION.

A. The Commission Should Amend its Program Access Rules to Provide Complaining Parties With an Automatic Right to Discovery as to Certain Essential Documents In the Possession of the Defending Party.

Currently, the Commission's program access rules do not provide a complaining party with an automatic right to discovery. Instead, the Commission's staff has the discretion to order discovery if it determines that the complainant has established a *prima facie* case and that further information is necessary to resolve the complaint.[26/] The staff then determines what additional information is necessary, and is authorized to develop a discovery process and timetable to resolve the dispute expeditiously.[27/] In developing their approach to discovery, the Commission forced the

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[25/] Ameritech has also requested that the Commission amend its rules to require that all program access complaints be resolved within 90 days where there is no discovery and within 150 days where there is discovery. Ameritech Petition at 8. While WCA is not opposed in principle to the idea that program access complaints should be resolved as quickly as possible, WCA is also aware that processing delays in the program access arena in many cases are attributable to chronic staff shortages within the Commission's Cable Services Bureau and, on occasion, requests for extensions of time filed by the complaining or defending parties. In its *Third Annual Report*, the Commission has already made a commitment to "process program access complaints in the most expeditious fashion possible, and to continue vigilant and meaningful enforcement policies in this area." *Third Annual Report* at ¶ 159. WCA thus believes that while strict processing deadlines would certainly add some predictability to the processing of program access complaints, the Commission effectively can achieve the same result by assigning more staff to the Cable Services Bureau and thereby enhance the Bureau's ability to handle program access matters on an expedited basis.

[26/] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage)*, 8 FCC Rcd 3359, 3420 (1993) ["*First Report and Order*"]

[27/] *Id.*

Bureau to adopt a "hands on" approach during the course of the discovery process:

> In some cases, we expect that the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced. The staff will determine whether it is necessary to file discovery materials with the Commission, or whether they should be provided only to the opposing party. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the complainant pursuant to a protective order within a specified time period. . .
>
> If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance. As in Section 208 common carrier complaint proceedings, the staff will be authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties.[28/]

In view of the above, it is easy to see why the Bureau has yet to order discovery in a single program access case. Because the Commission requires the Bureau to be very heavily involved in the discovery process itself, the Bureau's staff understandably will make every effort to decide a program access complaint "on the papers" rather than become embroiled in elaborate discovery procedures that drain the Bureau's scarce resources and delay a final decision on the merits. The fact remains, however, that alternative MVPDs are denied a full opportunity to present their best case to the Commission if they are not given access to certain documents within the defending party's possession that would demonstrate whether a program access violation has occurred. This is particularly true in cases of alleged price discrimination: without access to a programmer's affiliation contracts with similarly situated parties, it is virtually impossible for an alternative MVPD to prove

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[28/] *Id.* at 3421.

that a programmer has refused to deal on fair and equitable terms.[29/]

WCA submits that the Commission can address this problem by giving program access complainants an automatic, carefully circumscribed right to discovery that will require a defending party to produce critical documents at an earlier stage in the complaint process.[30/] Such an automatic discovery right, perhaps modeled on the Federal Rules of Civil Procedure, preserves the Commission's resources because the staff would not be required to determine in each and every case whether discovery would be useful, and, if so, develop an *ad hoc* discovery procedure. Instead, by simply establishing blanket rules as to what documents must be produced in response to specific types of program access complaints, the Commission can effectively eliminate unnecessary layers of decision-making while ensuring that all relevant documents are made available to the complaining party as quickly as possible.

Furthermore, contrary to what the Commission suggested in its *First Report and Order*

[29/] The Commission has already recognized that the analysis of whether another MVPD is similarly situated will involve a consideration of geographic region (proximity), the number of subscribers, the date of entry of contract, the type of service purchased, and specific terms related to distinct attributes of the purchasers or secondary transactions involved in the programming sale itself. *First Report and Order* at 3417 n.224. Virtually all of this information will be in the exclusive possession of the programmer, and thus for all practical purposes cannot be accessed by an aggrieved MVPD in a timely fashion without mandatory discovery.

[30/] The Commission has already recognized that requiring essential documents to be produced early in a "paper hearing" achieves the benefits of full disclosure without engendering lengthy and often counterproductive disputes over discovery. *See, Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represubscription and Enforcement Processes,* 10 FCC Rcd 6788, 6822 (1995); *Implementation of the Telecommunications Act of 1996 - Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers,* CC Docket No. 96-238, FCC 96-460, at ¶ 49 (rel. Nov. 27, 1996).

implementing its program access rules, a limited right to automatic discovery would facilitate expeditious resolution of program access complaints. The Commission has asserted that "the nature of the programming distribution marketplace, and the wide range of sales practices" militate against mandatory discovery in program access cases.[31/] WCA submits that in fact the opposite is true: mandatory discovery procedures would be beneficial precisely *because* the interrelationships and sales practices among programmers and MSOs are becoming more extensive and complex. Given the increasingly complicated nature of the relationships among programmers and cable operators, one cannot hope to prove a program access complaint unless essential documents are produced early in the process. By allowing mandatory discovery, the Commission can avoid bogging down the staff with the task of designing and implementing customized discovery procedures for every individual case and entertaining the inevitable objections thereto from defending parties. Given the current limits on the Commission's resources, there is no sensible reason to promote such a result.

Moreover, mandatory, limited discovery will serve the public interest by minimizing the damage inflicted on alternative MVPDs through "stonewalling" tactics. On this point, WCA urges the Commission to bear in mind that every day on which a program access complaint remains pending is another day on which an alternative MVPD does not have access to the same programming as its competitors. The MVPD marketplace is *service-oriented*: consumers are buying programming, not the technology used to deliver that programming. Potential wireless cable subscribers will not stand by idly and wait for a wireless cable operator to obtain relief through the program access complaint process, particularly when they can purchase service from an incumbent

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[31/] *First Report and Order* at 3421.

cable operator in the market who is providing a full slate of the popular cable programming which consumers have come to demand. Again, it must be emphasized that Congress adopted the program access provisions to *promote* competition to the cable industry; the Commission risks cutting that competition off at the knees unless its procedural rules for program access complaints limit administrative delay to the greatest extent possible.

B. The Commission Should Amend Its Rules to Make Damages Available as a Remedy in Program Access Cases.

The Commission has already determined that it has the necessary legal authority to award damages as a remedy in program access cases, and WCA believes that the Commission's determination remains correct.[32/] Under Section 628(e)(1) of the 1992 Cable Act, the Commission may "order appropriate remedies, *including*, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[33/] As the Commission recognized in its program access decision with respect to exclusive programming contracts in the DBS industry, the use of the term "including" in the program access statute "indicates that the specified list . . . that follows is illustrative, not exclusive."[34/] Indeed, the United States District Court for the District of Columbia recently reemphasized that the *expressio*

[32/] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage (Order on Reconsideration)*, 10 FCC Rcd 1902, 1910 (1994) [the "*Program Access Reconsideration Order*"].

[33/] 47 U.S.C. § 548(e)(1) [emphasis added].

[34/] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage (DBS Order)*, 10 FCC Rcd 3105, 3122 n.85 (1994), *citing Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 112 n.26 (D.C. Cir. 1981).

unius maxim - - that the expression of one is the exclusion of others - - "has little force in the administrative setting," where courts defer to an agency's interpretation of a statute unless Congress has "directly spoken to the precise question at issue."[35/] As the Commission has already recognized, there is nothing in the 1992 Cable Act or its legislative history which indicates that Congress intended to preempt the Commission from assessing damages as a remedy for program access violations.[36/]

Moreover, it is well settled that the Commission enjoys significant discretion to choose among a range of reasonable remedies.[37/] In this regard, Section 4(i) of the Communications Act of 1934, as amended, authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[38/] The Commission has noted that it "may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited

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[35/] *Mobile Communications Corp of America v. FCC*, 77 F.3d 1399, 1404-5 (D.C. Cir. 1996) [citations omitted]; *see also Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 196 (D.C. Cir. 1995) [holding that because nothing in the 1992 Cable Act precludes the Commission from allowing refunds to remedy unreasonable basic rates, the Commission's decision to allow franchising authorities to order refunds did not violate the Act.].

[36/] *Program Access Reconsideration Order* at 1910. *See also Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 274 (D.C. Cir. 1978) ("[c]ourts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy") [subsequent history omitted]; *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) (holding FTC "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce").

[37/] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) [subsequent history omitted] ["*New England Tel.*"]; *Lorain Journal Company v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965) ["[T]he choice of remedies and sanctions is a matter wherein the Commission has broad discretion."].

[38/] 47 U.S.C. § 154(i).

by the Act and is necessary to the effective performance of the Commission's functions."[39] For this very reason, courts have cited Section 4(i) as a basis for the Commission's broad authority to fashion appropriate remedies.[40]

Lastly, the Administrative Procedure Act ("APA") grants federal agencies, including the Commission, the authority to impose a "sanction" on individuals and businesses subject to its jurisdiction.[41] The assessment of damages is specifically included in the APA's definition of "sanction."[42] WCA thus submits that for all of the above reasons there is little doubt that the Commission has the necessary statutory authority to impose damages as a remedy in program access cases.

To date, however, the Commission has refused to create a damages remedy for violations of its program access rules, on the theory that damages have not been proven necessary to ensure effective enforcement.[43] As the Ameritech Petition establishes, however, in the absence of a damages remedy a defendant in a program access case has little incentive to negotiate with an aggrieved MVPD before a complaint is filed, nor does it have much incentive to resolve the matter

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[39] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd 18233, 18238 (1996); *see also North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1929-93 (7th Cir. 1985) [Section 4(i) "empowers the Commission to deal with the unforeseen — even if that means straying a little way beyond the apparent boundaries of the Act — to the extent necessary to regulate effectively those matters already within the boundaries."].

[40] *See New England Tel.*, 826 F.2d at 1108.

[41] 5 U.S.C. § 558(b).

[42] The APA defines "sanction" to include any "assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees." 5 U.S.C. § 551(10)(E).

[43] *Program Access Reconsideration Order*, 10 FCC Rcd at 1911.

early in the process once the complaint is submitted to the Commission. This is because the Commission's existing remedies for program access violations are by and large prospective only.[44/] As a result, violations of the Commission's program access rules achieve their intended purpose: competing MVPDs are denied access to programming for extended periods of time, after which defendants either (1) settle their cases at the last possible moment or (2) prosecute their cases to the very end, with the knowledge that if they lose the Commission at most will simply require them to adjust their future behavior to comply with the program access rules.

WCA thus submits that the only truly effective way to minimize dilatory conduct during the program access complaint process is to amend the Commission's rules to specifically provide for a damages remedy measured from the date on which a complaint is filed until the Commission issues a final determination that defendant has violated the program access rules. Once a program access defendant is put on notice that it may be subject to damages by virtue of its illegal conduct, it is far less likely to countenance "stonewalling" tactics that merely stall Commission action for the indefinite future until the defendant decides it is prudent to settle. By the same token, alternative MVPDs are more likely to receive near-term resolution of their program access complaints, which, regardless of whether they are settled or are disposed of on the merits, will be litigated at a much

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[44/] For instance, with respect to prohibited exclusive agreements, the Commission "may order the vendor to make its programming available to the complainant on the same terms and conditions, at a nondiscriminatory rate, as given to the cable operator." *First Report and Order*, 8 FCC Rcd at 3392. In price discrimination cases, a vendor who engages in unlawful activity may be ordered "to revise its contracts to offer to the complainant a price or contract term in accordance with the Commission's findings." *Id.* at 3420. *See also CellularVision of New York, L.P.*, 10 FCC Rcd 9273 (CSB, 1995), *recon. denied*, 11 FCC Rcd 3001 (CSB, 1996) [Bureau orders Cablevision to sell its SportsChannel New York programming on non-discriminatory terms within 45 days; no other sanction ordered].

faster clip by the defendants. The net result will be that the program access rules will regain their original focus, *i.e.*, providing an effective forum for resolution of program access disputes in the best interests of consumers.

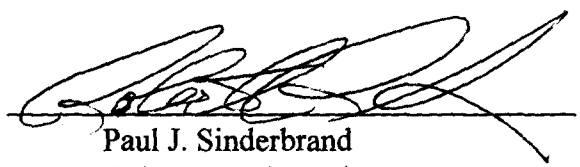
III. CONCLUSION.

WCA wishes to emphasize that it is not recommending that the Commission undertake a wholesale revision of its program access rules at this time. Nonetheless, there is little question that over the next few years the Commission will be regulating a multichannel video marketplace that will look far different than the one that produced the original program access rules in 1993. Consolidation and joint ventures among cable operators and programmers is reaching an all-time high. WCA thus believes it would be unwise for the Commission not to at least consider some targeted rule modifications to ensure that its regulatory framework can satisfy the demands of the new environment. As set forth in the Ameritech Petition and in WCA's comments herein, WCA submits that providing program access complainants with a mandatory, limited right to discovery and a damages remedy would be effective steps towards achieving this objective.

WHEREFORE, the Wireless Cable Association International, Inc. respectfully requests that the Commission issue a *Notice of Proposed Rulemaking* in this proceeding in accordance with the comments set forth above.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 2006
202/783-4141

Its Attorneys

July 2, 1997

CERTIFICATE OF SERVICE

I, Sheryle Price, hereby certify that on this 2nd day of July, 1997, caused to be delivered the foregoing Comments by first class mail, postage prepaid to:

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606

*The Honorable Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Lawrence R. Sidman
Jessica A. Wallace
Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005

*The Honorable Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

*The Honorable Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

*The Honorable James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

*Meredith J. Jones
Federal Communications Commission
2033 M Street, N.W.
Room 918-A
Washington, D.C. 20554

*William H. Johnson
Acting Deputy Chief for Policy
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

Sheryle Price

*Hand-Delivery